

Testimony of
Ronald F. Waterman

SB 306

**An Act Abolishing the Death Penalty and Replacing it with Life Imprisonment
without Possibility of Release**

House Judiciary Committee Hearing

March 9, 2007

Testimony in Support of SB 306
ABOLITION OF DEATH PENALTY IN MONTANA

Members of the House Judiciary Committee

I am Ronald F. Waterman, an attorney in private practice in Helena, Montana. I submit this testimony in support of SB 306 which would abolish the Death Penalty in Montana.

I was one of the attorneys who represented Duncan McKenzie during his appeals from his death sentence. I conducted the hearing on the clemency petition Mr. McKenzie submitted to former Governor Racicot immediately before his execution. I was with Mr. McKenzie at the time of his execution.

Additionally, during the summer of 2006, I was the lead attorney for the ACLU challenging the lethal injection protocol which was administered in the execution death of David Dawson. As we undertook that challenge, we found that the same protocol had been challenged in a number of other states, including Arkansas, California, Delaware, Missouri, Ohio, Tennessee, as well as the District of Columbia. One of these cases from the U.S. District Court in California ultimately concluded after an extensive hearing, that administration of the lethal injection protocol was barred by the Eighth Amendment because it was both cruel and unusual punishment and likely to result in the intentional infliction of pain and suffering through the administration of the drugs which consist of the lethal injection protocol. This case is now on appeal to the Ninth Circuit. Additionally two other states have suspended lethal injections due to botched executions and one state, New Jersey, has completed a study which recommends abolishing the death penalty.

Had the parties who presented this challenge been able to convince a court that they had a sufficient interest in the subject of the litigation to be directly impacted by its outcome, I am convinced that a court, most likely the U.S. District Court for Montana, would have also held that the lethal injection protocol followed in Montana was unconstitutional.

Judge Molloy said during the proceeding in that case: "I think there's significant merit to the problems with the death penalty protocol." Additionally, the Court commented:

"I'm very troubled by the protocol and by the cases that have interpreted and

stopped implementation of a death penalty using similar protocols. I am troubled deeply, by the death warrant in this case and looking at it and the statute. And there's no question Judge Todd followed the statute. But when I read the statute, the protocol goes beyond the statute... And if the protocol exceeds the bounds of the law, then you truly do, it seems to me, have a potential homicide."

Judge Molloy further indicated his belief that likely a claimant would succeed on a challenge to Montana's death penalty protocol, observing:

"Of course, if there was a hearing where a State District Judge or a Federal Judge was authorized by the normal process of hearing both sides, with all of the evidence, then I think there could be a determination as to whether or not the Montana statute, as written, is unduly vague, or whether or not executions that go beyond the specific authorizations of the statute, are, in fact, legal executions, and then the protocol that is involved with the current execution protocol, whether or not that, in fact, violates the Eighth Amendment to the United States Constitution.

And of course, those questions are unanswered."

This Legislative body must understand that the last execution of an inmate in Montana was solely the result of the fact that David Dawson was a volunteer -- that is, he chose to stop all challenges to his execution. So, in Montana, we have witnessed an inmate dying because the State was willing to participate in a state-assisted suicide. This body must also understand that the last execution was likely the last execution which Montana will conduct. Either the California case will be affirmed by the Ninth Circuit, which is likely, in which case, Montana will be barred from undertaking any further executions, or a challenge will be mounted against the protocol in Montana and it will succeed. Additionally it is potentially possible that the U.S. Supreme Court will strike the protocol should the right case reach the Court.

I support SB 306. It is time to abolish the death penalty in Montana. The death penalty is cruel and unusual punishment and should be banned as being in violation of the Eighth Amendment to the United States Constitution. Presently the death penalty is disproportionately applied to minority members of our society and is applied in a random and capricious manner, with virtually no predictability.

The exercise of the death penalty is riddled with mistakes, leading to the sentencing and potential executions of innocent individuals or individuals who should not be subjected to this severe a sentence. It is estimated that over 75% of all death sentences are subject to some flaw, either in the guilt phase or in the penalty phase of the proceeding. An examination of the death sentence in Montana reveals that the death sentence has been improperly imposed at least 68% of the time. On at least four occasions, courts have set aside death sentences and directed that the inmate be resentenced to a lesser sentence. Other death sentences have also been set aside due to errors committed in the sentencing process.

Several years ago, during a conference on the death penalty, former Governor Racicot correctly commented that the only justification for the death penalty was if this sentence deterred other capital crimes. While Governor Racicot offered his personal view that the death penalty did deter crime, his view is not shared by any criminologist or other individual who has studied this issue. There simply is no research which supports the conclusion that the death penalty deters crime.

There are several reasons for this conclusion. The first, noted above, is that most people believe that the death penalty is flawed and frequently results in an erroneous sentence. This belief dispels any deterrent effect of the death sentence.

Second, the death penalty is simply too random in its application to deter crime. It is too easy for any individual to quickly become convinced that the death penalty will not be applied to their act, regardless of the severity of the crime. For years, my legal work took me to Montana State Prison at Deer Lodge on a number of occasions. Most of the time when I was at the prison, I was on the high-security side and I spent a considerable amount of time in the Maximum Security Unit. If I could take committee members to the prison, I could identify individuals in the prison population, who committed crimes of a similar and in some instances, an identical nature of the crimes which resulted in a death sentence imposed upon only a few individuals at prison. A death penalty sentence is simply too randomly applied to result in any deterrence.

Third, even with the actions of Congress which have eliminated successive and repetitive appeals of death sentences, the amount of time between the commission of a capital crime and the carrying out of a death sentence, results in a lack of deterrent effect of any such sentence.

Finally, the death sentence does not deter due to the nature of the underlying capital offense itself. There are a number of reasons why people kill. None, however, warrant society deliberately taking an individual's life.

Earlier I alluded to the fact that the death penalty in Montana is not likely to ever be carried out again. This fact, however, only underscores the need to abolish the death penalty now. For while it may be correct that the State will never carry out a death sentence again, this does not mean that a county prosecutor may nevertheless seek a death penalty in a case. Whenever the death penalty is sought, the criminal justice system must respond appropriately, with the appointment of death qualified counsel and numerous experts, all of whom will cost the State considerably. A death case is a case in which the expenses are all front end loaded -- of the more than a million dollars which will be spent on a death penalty case, most of the money, at least \$400,000 and perhaps as much as \$750,000, will be spent during the trial and penalty phase of the case. The potential waste of this amount of taxpayer money can be avoided only if the option of seeking the death penalty is removed totally from the prosecutor's options.

Criminals typically do not commit a capital crime through planning and stealth. The typical capital crime does not involve any cost-benefit analysis, weighing the crime and its potential punishment, on one hand, and the crime and its potential benefits on the other. Rather, most capital crimes are the result of a combination of factors, none of which are affected by the potential of a capital sentence.

Individuals who commit capital crimes, like virtually all criminals, are socially disabled or socially deficient individuals. These individuals are incapable of forming close bonds or friendships with others, they are incapable of empathy, and incapable of projecting that their actions could cause harm or injury to another. Usually this social disconnect is the result of early childhood sexual and physical abuse. About 80% of all inmates have a history of early childhood abuse -- the percentage is higher among capital crime inmates. Recent studies point to the conclusion this social disconnect is most extreme in the capital offender.

Additionally, capital crimes are not planned crimes but usually are the result of an unexpected escalation of poorly thought out lesser crimes, typically a robbery or burglary gone sour, with events cascading out of control. Capital crimes are the result of the easy availability of firearms. Capital crimes usually

involve drug or alcohol use -- not that the perpetrators are intoxicated or high, only that the individuals have used substances sufficiently to wipe away any normal inhibitions which would otherwise form a boundary against such conduct.

Thus, the only justification for the exercise of capital punishment, that carrying out such a sentence will deter other capital crime, simply does not exist.

Earlier I commented that capital punishment is randomly exercised. However, as to those under a capital sentence, there are a cluster of unfortunate statistics, which all underscore the basic unfairness of this sentence.

1. The individuals who are sentenced are usually strangers to the community where the crime occurred.
2. The individuals are poor -- virtually all have been represented by appointed counsel -- usually under-experienced, underpaid and without adequate resources for investigation and expert testimony include penalty phase representation.
3. The individuals have been subject to early childhood abuse -- often sexual abuse.
4. The individuals have experienced some type of significant head trauma -- or have a mental capacity at or below normal -- a recent study showed an identifiable head injury in virtually every capital defendant.
5. The individuals have been the focus of some law enforcement officer who pushed to make the case a capital offense.
6. The individual is a member of a racial minority. At one time in Montana, we had one Afro-American out of four capital defendants at a time when Afro-Americans represented less than 1% of Montana's population. For a time Montana had 2 out of 8 death sentence defendants who were native American when the native American population was 5% of the total population.

There is one other issue of concern with the death penalty. Once administered, the penalty cannot be reversed should an individual be later found innocent of the crime the person was convicted of. I represent one of the three

individuals whose convictions have been reversed because they were factually innocent. Despite scientific advances in DNA testing and Montana's improved public defender system, mistakes can and do happen. Regardless of how accurate testing is, the results are still capable of manipulation. Our system of justice is not perfect yet the administration of the death penalty requires perfection. Other states have found that it is likely innocent persons have been put to death through mistakes within their system. There is no way, however, to correct such an error. Abolition of the death penalty alone is the only way to avoid such a tragic mistake.

These disturbing statistics underscore the conclusion that in America and in Montana, we execute the poor, the slow, the strangers and the racial minorities.

Finally, at a time when this Legislature is looking for sources of revenue to fund schools, to develop the economy and to attend to the needs of the elderly and the mentally ill, continuing to apply the death penalty wastes the limited resources of the state. Every capital case requires the dedication of substantial state resources from the commencement of the prosecution, throughout the criminal justice trial and appellate reviews, through to the execution. Looking at the entire justice and correctional system costs, every capital case requires the consumption of hundreds of thousands and at times, over a million dollars. While a person could assert that there are some savings, comparing the cost of housing an individual for a full life sentence as compared with the shorter period of incarceration until an execution is carried out, such an assertion can only be made if one first ignores all of the criminal justice system expense consumed during the trial and appellate phases of a capital case.

Society should not and Montana should not merely retain the death penalty simply to retaliate against an individual who has taken the life of another. Presently as our state seeks revenge, we cheapen all human life.

It is time to abolish the death penalty in Montana.

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- Education:** University of Montana, Missoula, Montana
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Partner (1972-present)
Associate (1970-1972)
Admitted United States Supreme Court - 1976
United States Court of Appeals
for Ninth Circuit - 1972
United States District Court,
District of Montana - 1970
Montana Bar - 1969
- Professional:**
- Rating:** Martindale-Hubbell - AV
The Best Lawyers in America - 1991-present
- Organizations:**
- Legal:** American Law Institute (1975 - present)
--Principles of Family Law, Consultant;
--Principles of Suretyship, Consultant;
--Restatement of Law Third, Torts;
--Product Liability, Consultant
United States Court of Appeals, Ninth Circuit
--Lawyer Representative (1991-1994)
--Chair (1993-1994)
American Bar Association (1969-present)
--State Membership Chairman 1973-1977
Fellow, American Bar Foundation (1976-present)
State Chair (1987-1996)
--Life Fellow (1986-present)
United States District Court
--Gender Equity Committee (1992-1994)

American Academy of Appellate Lawyers
(1994-present)
American Judicature Society
Board Member (1979-1983)
State Bar of Montana (1969-present)
Model Penal Code

Community:

United Way of Lewis & Clark County
(1974 - present)
UM Law School Board of Visitors
(1988-2005)
St. Paul's United Methodist Church
--Administrative Board (1985-1987)
--Chair, Council of Ministries (1989-1991)
Grand Street Theatre Board (1986 - 1997)
--President (1991-92)
Center for Adolescent Development
--Board of Directors (1990-1994)
--President (1992-1994)
Florence Crittenton Board of Directors
(1985-present)
National Crittenton Foundation
(2004-present)

Publications:

Product Liability, Montana Chapter
50 State Handbook,
West Publishing, 1994

Public Construction Contracting
in the Fifty States, Montana Chapter,
Wiley Publishing, 1995